

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 27, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0694

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

In re the Estate of Virginia M. Mahler:

**RICK MONTGOMERY and
BETH MONTGOMERY,**

Petitioners-Appellants,

v.

CARL J. MAHLER,

Respondent.

APPEAL from an order of the circuit court for Forest County:
ROBERT E. KINNEY, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Rick and Beth Montgomery appeal a trial court order that dismissed their petition for ancillary probate of the will of Virginia Mahler, who owned real estate in Wisconsin but whose domicile at death was Illinois. The trial court ruled that the Montgomerys lacked standing. The

Montgomerys, who are not related to Virginia, claim standing to seek probate on the basis of a prejudgment attachment lien they filed against Virginia's Wisconsin real estate. The prejudgment attachment lien issued out of a tort lawsuit the Montgomerys were pursuing against Carl Mahler, Virginia's son, who occupied Virginia's Wisconsin real estate. By the time that the probate court dismissed the Montgomerys' petition, the Montgomerys had obtained a judgment against Carl, with their attachment lien thereby having ripened into a judgment lien.

The Montgomerys rely on § 856.07(2), STATS., which allows "anyone who has an interest in the property which is or may be part of the estate" to seek the will's probate. For several reasons, the trial court ruled that the Montgomerys' attachment lien did not give them such an interest in Virginia's Wisconsin real estate: (1) Carl, the Montgomerys' debtor, had no present interest in the real estate that their lien could reach, despite being an heir and beneficiary under Virginia's will; (2) various statutes barred attachment and execution on property of the estate by an heir's creditor; and (3) the real estate was exempt from attachment and execution as *custodia legis*. The trial court also denied the Montgomerys' attorney's fees for probating the estate. We agree that the Montgomerys had no standing to seek the probate of Virginia's will. We therefore affirm the trial court's order.

Whether viewed as prejudgment attachment creditors or judgment creditors, the Montgomerys did not have standing. In order to petition for administration, they needed to demonstrate an interest in the real estate. Their attachment lien or judgment lien did not provide the requisite interest for two reasons. First, a lien is not an interest in property under § 856.07(2), STATS. Liens are generally considered encumbrances on, not interests in, property. See BLACK'S LAW DICTIONARY 832 (5th ed. 1979). Second, Carl had no interest in the real estate that the liens would reach. Although at common law defeasible title to real estate vested in the beneficiary immediately upon the death of the decedent, see *Hinman v. Hinman*, 126 Wis. 191, 193-94, 105 N.W. 788, 789 (1905), ATKINSON, WILLS § 199, at 537-38 (1937), title now passes to the personal representative by virtue of legislation enacted in 1969. See § 857.01, STATS. Here, there is no personal representative; nonetheless, we do not believe that this revives the common law rule giving Carl defeasible title to the real estate.

At best, Carl has an intangible future and contingent interest in his mother's unprobated estate. Judgment creditors may reach this intangible interest not through attachment or judgment liens, but through the judicial assignment of Carl's intangible interest to a receiver or judicial trustee appointed by a court of equity. See DOBBS, REMEDIES § 1.3 at 11, and § 2.12 at 130 n. 43 (1973); *Ager v. Murray*, 105 U.S. 126, 126-32 (1881). The proceeding is in the nature of a judgment creditor's suit or bill. See DOBBS, § 1.3 at 11 and § 2.12 at 130 n. 43; *Ager*, 105 U.S. at 126-32; BLACK'S LAW DICTIONARY 333 (5th ed. 1979). Pursuant to the equity receivership or trusteeship, the receiver or judicial trustee, as assignee of Carl's intangible interest as beneficiary or heir, may take whatever action is equitable to satisfy the judgment, such as selling Carl's intangible interest or petitioning the probate court for the probate of Virginia's will under § 856.07(1), STATS., as a "person interested." See *Hanley v. Kraftczyk*, 119 Wis. 352, 357, 96 N.W. 820, 821 (1903) (assignee of heir's interest may seek probate of will); see also DOBBS, § 1.3 at 11 and § 2.12 at 130 n.43; *Candee v. Egan*, 84 Wis.2d 348, 361, 267 N.W.2d 890, 897 (1978); *Arzbacher v. Mayer*, 53 Wis. 380, 10 N.W. 440 (1881); §§ 813.026 and 816.04, STATS.

The equity receiver or trustee takes such action for the benefit of the judgment creditor under the supervision of the court of equity making the appointment and assignment. See generally 1 CLARK, RECEIVERS §§ 204-215, at 310-25 (3d ed. 1959). In addition, in lieu of a receivership or trusteeship, judgment creditors may have other equitable remedies available to them. These may include, but are not limited to, direct judicial assignment of Carl's intangible interest to the judgment creditor to satisfy the judgment. See DOBBS, § 1.3 at 11; *Ager*, 105 U.S. at 126-32. Under this remedy, the judgment creditor, as assignee of the intangible interest and under the court's supervision, may sell the intangible interest or petition for the probate of Virginia's will under § 856.07(1), STATS. See *Hanley*, 119 Wis. at 357, 96 N.W. at 821. We have described these remedies for purposes of illustration. We do not attempt here to identify all the available supplementary and equitable remedies judgment creditors may have for reaching intangible interests. Last, as the Montgomerys have no standing to seek administration, the trial court properly denied them attorney's fees for probating an estate.

By the Court.—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.